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ALEXANDER L. STEVAS,
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

Gary Gianni,
Petitioner,

v.

United States of America,
Respondent.

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

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THE QUESTION PRESENTED

Whether the conduct of Drug Enforcement Administration agents in instigating a drug transaction and supplying the controlled substance to the Petitioner constituted outrageous conduct and a denial of Due Process.

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United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978)	8

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Petitioner respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeal is reported at 678 F.2d 956 (Appendix A). The opinion of the district court is not reported.

JURISDICTION

The judgement of the United States Court of Appeals for the Eleventh Circuit was entered on June 14, 1982. A timely petition for rehearing was denied on August 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part.

"No person shall ****be deprived of life, liberty, or property without due process of law****."

STATEMENT OF THE CASE

Petitioner was found guilty by The Honorable Richard B. Kellam, in the United States District Court for the Middle District of Florida, of conspiracy with intent to distribute marijuana, in violation of Title 21 United States Code Sections 841(a)(1) and 846. A one year sentence of incarceration was imposed. The question presented for review in this Petition arises out of the United States Court of Appeals for the Eleventh Circuit's failure to overturn Petitioner's conviction. Petitioner argues before this Court that his conviction was obtained by outrageous government conduct, violative of his right to Due Process of Law.

In the summer of 1980 the Drug Enforcement Administration (DEA) instituted an undercover operation entitled "Operation Doublecross". Approved by the United States Department of Justice, the operation involved the undercover sale of marijuana by DEA agents.

Pursuant to the guidelines of Operation Doublecross, DEA Agent Fagan contacted Kenneth Craig and requested Robert Karley's telephone number. The agent had met Craig and Karley approximatley one year before during the course of an undercover DEA operation.

In seperate telephone calls, Agent Fagan informed the two that he had a large quantity of marijuana for sale. After a series of conversations a meeting was arranged between the agent and the two men at a Holiday Inn in Seminole County, Florida. The undercover agents agreed to

sell marijuana for $245.00 per pound. To effectuate the transaction the agents would receive keys to various automobiles from Karley and Craig and then load the cars at an unknown location. Upon the return of the loaded cars by the undercover agents an exchange of keys for money would take place.

During one of the meetings, the undercover agents met David Wainer. Wainer indicated that he had buyers at the Holiday Inn, but he only wanted to purchase a hundred pounds of marijuana. The agents refused his offer and insisted that they had a thousand pound limit. After additional negotiations, Wainer agreed to deal with the undercover agents the following day.

The following morning the agents loaded three vehicles with 390 pounds of marijuana and returned them to the Holiday

Inn's parking lot. An exchange of keys and money was made between the agents and Wainer. After the vehicles left the parking lot their occupants were arrested.

Later that same day a second transaction was arranged in which 760 pounds of marijuana was transferred in the same fashion. The Petitioner was arrested while operating a car loaded with marijuana in the second transaction.

Prior to trial the Petitioner filed a Motion to Dismiss Indictment based on a denial of his due process right. This motion was denied by Judge Kellum.

The Petitioner made a timely appeal of his conviction and the denial of his Motion to Dismiss to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit affirmed Petitioner's conviction on June 14, 1982. See Appendix A.

REASONS FOR GRANTING THE WRIT

This Petition raises a substantial and important question concerning the permissible level of government involvement in criminal activity. The decision of the Court of Appeals, if allowed to stand, will in effect create a situation where the Government will be promoting rather than detecting crime.

The Eleventh Circuit, in holding that the conduct of the DEA did not constitute a denial of the Petitioner's right of Due Process, relied on this Court's rulings in Hampton v. United States, 425 U.S. 484 (1976) and United States v. Russell, 411 U.S. 423 (1973). In Hampton v. United States, 425 U.S. 484 (1976), this Court stated that it is not necessarily misconduct for government agents, while investigating criminal activity, to supply or sell illegal drugs or provide other

essential services. 425 U.S. at 489. United States v. Russell, 411 U.S. 423 (1973) recognized that the Government's infiltration of criminal activity is a permissible means of law enforcement. 411 U.S. at 432.

Here, the Court is present with a factual scenerio which is divergent from the two earlier cases. The case before the Court is an example of the type of conduct condemned in United States v. Russell, 411 U.S. 432, 431-32 (1973):

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction...

The conduct of the DEA can neither be characterized as the mere infiltration of a drug orgainization nor simply the sale of an illegal drug. The criminal

activity, in this case, could not have proceeded to fruitation as in United States v. Russell, 411 U.S. 423 (1973) without the aid of the Government. Agents of the Government used their resources to create a crime rather than to detect one in progress. The facts before the lower court establish that DEA undercover agents controlled every aspect of the criminal transaction from start to finish as in United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978). In Twigg, a conviction was reversed due to outrageous conduct displayed by the Government agents.

Contrary to Hampton v. United States, 425 U.S. 484 (1976) and United States v. Russell, 411 U.S. 423 (1973) the Petitioner's predisposition was not a factor. While there existed evidence to show predisposition on the part of Karley, Craig and Wainer to commit the crime, the

record is devoid of any predisposition on the part of the Petitioner. At trial, the Government did not offer proof that the Petitioner was involved in unlawful drug trafficking transactions with Craig, Karley or Wainer prior to the Government's instigation of the crime for which he was convicted.

In Hampton v. United States, 425 U.S. 484 (1976) the defendant, a known drug user, was convicted on the subsequent sale of Government supplied contraband and not for possession. The fact of the sale indicates a criminal intent beyond that which is required for possession and the defendant in Hampton, admitted predisposition on his part. He acknowledged the fact that he had solicited the drug sale to make money. The incident was part of ongoing criminal activity. In this case,

the Petitioner did not claim entrapment and lack of predisposition because he did not have contact with Government agents.

Justice Powell at 425 U.S. 495 f.n. 7 stated that the cases, if any, in which proof of predisposition by the Government is not dispositive will be rare, and in this case, there is no proof of Petitioner's predisposition by the Government.

Considering, the egregious conduct of the DEA in this case, it was the duty of United States Court of Appeals for the Eleventh Circuit to reverse the Petitioner's conviction. Its failure to do so resulted in a violation of the Petitioner's Due Process rights. In order to assure that Petitioner and all defendants in his position are protected from the unconstitutional law enforcement tactics denounced in United States v. Russell, 411 U.S. at

431-432, this Court should grant certiorari to reverse Petitioner's conviction.

CONCLUSION

For the reason set forth above, it is respectfully submitted that this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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